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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEWIS,

Defendant and Appellant.

B200451

(Los Angeles County  
Super. Ct. No. BA317883)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anita H. Dymant, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, for Plaintiff and Respondent.

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Defendant and appellant Kenneth Lewis appeals from the judgment entered following a jury trial that resulted in his conviction of possession of heroin for sale.<sup>1</sup> He contends: (1) there was insufficient evidence to support the judgment; (2) the trial court failed to instruct that an expert's opinion is circumstantial evidence; and (3) imposition of the upper term violated the principles set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that defendant was detained when Los Angeles Police Officers Jeffrey Yabana and Ricardo Dominguez observed him riding a bicycle on the wrong side of San Julian Street near 7th Street. In defendant's jacket pocket, Yabana found 13 equally sized heroin-filled balloons, weighing a total of 1.52 grams and wrapped together in clear cellophane. Other than the balloons, the bicycle and \$25.80 in cash, defendant had no other personal belongings in his possession; he was not in possession of any tools used to ingest heroin (e.g., a syringe, lighter, filter material) and he did not exhibit any sign of heroin intoxication.

As defendant was being booked at the police station, he stated that when he saw the officers approaching, he swallowed 12 heroin-filled balloons. (These 12 were apparently in addition to the 13 balloons Officer Yabana found on defendant's person.) An ambulance was summoned and Officer Dominguez accompanied defendant as he was transported to the jail ward at U.S.C. Medical Center while Yabana followed in the patrol car. During the trip, Dominguez observed defendant begin to sweat profusely, moan as if

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<sup>1</sup> Defendant was charged with possession of heroin for sale (Health & Saf. Code, § 11351); prior conviction enhancements were alleged pursuant to Penal Code section 667.5, subdivision (b) and Health and Safety Code section 11370.2, subdivision (a). After a jury found him guilty of possession for sale, he admitted the priors. The trial court struck all of the enhancements except one Penal Code section 667.5, subdivision (b) prior and sentenced defendant to five years in prison comprised of the four-year high term plus a consecutive one year for the enhancement.

he were ill, and pass in and out of consciousness. At the hospital, defendant was placed in a treatment room. Over the next five hours, Yabana or Dominguez walked into his room every 15 or 20 minutes to check on him. During that time, defendant never showed any signs of heroin intoxication. At the end of five hours, defendant was returned to police custody; he was no longer exhibiting the symptoms Dominguez had observed in the ambulance. There was no evidence defendant excreted the 12 balloons he claimed to have swallowed. The officers brought defendant to the jail division at Parker Center, where Yabana performed a strip search.

Testifying as an expert witness, Detective Ronald Hodges concluded that defendant possessed the heroin for purposes of sale. Hodges, who had been in charge of an undercover squad working in the area of San Julian and 7th Streets for the past five or six years, explained that in that location heroin is typically packaged in “paquetes” of 12 or 13 balloons wrapped in cellophane; each balloon in the package contains about 0.10 grams of heroin. “Mouth dealers” typically buy one or two paquetes for \$50 each, and then sell the individual balloons for between \$5 and \$10 each. The mouth dealer will customarily hold several balloons at a time in his mouth; when he encounters a buyer, the mouth dealer will spit one or two balloons out and hand them to the buyer in exchange for money; usually, the buyer will go somewhere nearby to immediately inject the heroin. The mouth dealers store the balloons in their mouth in order to be able to swallow them quickly if they are stopped by the police. Hodges has observed sellers using bicycles to facilitate a quick getaway.

In Detective Hodges’s experience, a new heroin user will use one or two balloons a day while a “strung-out heroin user” will typically use six or seven balloons a day. Of the thousands of heroin addicts Hodges had spoken to during his 32-year career, only a few hundred ever claimed to use more than 10 balloons a day; two had claimed to use 24 balloons a day, but both were in the hospital and appeared near death. Hodges had never encountered a heroin user who purchased more than they intended to use immediately because they are afraid that if they have more than they need for immediate use they will be unable to stop themselves from overdosing. Although it is not uncommon for users to

sell and sellers to use heroin, a person who buys enough heroin to use some and sell some is not concerned about overdosing because he or she intends to quickly sell the portion not intended for immediate use.

## **DISCUSSION**

### **1.     *Substantial Evidence Supports the Judgment***

Defendant contends there was insufficient evidence that he possessed the heroin for the purpose of sale. He argues that Detective Hodges's opinion to the contrary was based on insufficient evidence; namely, the quantity of drugs found in defendant's possession and defendant's statement that he had had additional drugs in his mouth. We disagree.

“[I]n reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. [Citations.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1180.) “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*Id.* at p. 1181.)

The elements of the crime of possession of heroin for sale are (1) actual or constructive possession of the substance; (2) knowledge of its presence; (3) knowledge that it is heroin; and (4) intent to sell it. (*Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 421.) The intent element of the offense can be established by the testimony of an experienced police officer that the substance is possessed for purposes of sale based on the quantity, packaging, and normal use of an individual. (*People v. Newman* (1971) 5 Cal.3d 48, 53 (*Newman*), disapproved on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 861 (*Daniels*); see, e.g., *People v. Parra* (1999) 70 Cal.App.4th 222, 227 [opinion based on quantity and lack of drug paraphernalia

constitutes substantial evidence of intent]; *People v. Harris* (2000) 83 Cal.App.4th 371, 374-375 [opinion based on quantity of marijuana and methamphetamines; manner drugs were transported; and quantity of postage stamps, which were typically used as currency to purchase drugs]; *People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378 [opinion based on quantity of rock cocaine]; *People v. Peck* (1996) 52 Cal.App.4th 351, 357 [opinion based on quantity of marijuana].)

Here, Detective Hodges testified that his opinion that defendant possessed the heroin for sale and not personal use was based on the totality of the circumstances. The circumstances included that defendant was a transient; the location of his arrest (an area where drugs are typically sold to the end user); the large quantity of heroin and absence of any heroin-using paraphernalia in his possession; that he did not appear under the influence of heroin when he was arrested; that he stated that he had 12 balloons in his mouth, which he swallowed; and the manner in which the heroin found on his person was packaged. From the minimal number of needle marks Hodges observed on both of defendant's inner arms, Hodges concluded that defendant was not a heavy user and certainly did not use 13 to 25 balloons a day. Even if defendant had been in possession of a syringe, Hodges's opinion would have been the same because of the quantity of heroin-filled balloons defendant possessed, including those he claimed to have swallowed. Moreover, Hodges testified, "There is absolutely no reason anybody puts those [balloons] in their mouth unless they are going to turn around and spit them out one at a time and sell them."

Detective Hodges's opinion, based on the quantity, manner of packaging, normal use, and absence of paraphernalia, constituted substantial evidence that defendant possessed the heroin for sale.

## 2. *No Duty to Instruct that Expert Testimony Is Circumstantial Evidence*

Citing *Newman, supra*, 5 Cal.3d 48, defendant contends it was error for the trial court to not instruct sua sponte that expert opinion testimony is circumstantial evidence. The claim has no merit.

It is well settled that expert testimony is circumstantial evidence of intent. (See, e.g., *People v. Jones* (1954) 42 Cal.2d 219, 222 [psychiatric testimony constitutes “indirect evidence” of intent element of Pen. Code, § 288]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 [expert testimony constitutes circumstantial evidence of intent to kill]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 [intent to benefit a gang]; *Newman, supra*, 5 Cal.3d 48 [intent to possess for sale].) If expert witness testimony is received into evidence, the trial court has a sua sponte duty to give CALCRIM No. 332. (Pen. Code, § 1127b.) If the prosecution substantially relies on circumstantial evidence to establish the intent element of its case (i.e., expert testimony), the trial court has a sua sponte duty to give CALCRIM No. 223 [defining direct and circumstantial evidence] and CALCRIM No. 225 [sufficiency of circumstantial evidence of intent]. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) The trial court has a sua sponte duty to give CALCRIM No. 251 [union of act and specific intent] when the charged offense is a specific intent crime. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220.) Possession of heroin with intent to sell is a specific intent crime. (Cf. *Newman*, at pp. 53-54, disapproved on other grounds in *Daniels, supra*, 14 Cal.3d 857.)<sup>2</sup> Thus, where the prosecution relies on expert testimony to establish the specific intent element of a charge of possession with intent to sell, the trial court has a sua sponte duty to give CALCRIM No. 332, as well as Nos. 223, 225, and 251. Here, the trial court gave all four instructions.

Defendant has cited to no authority, and our independent research has developed none, that also requires the trial court to instruct expressly that expert testimony is a species of circumstantial evidence. Defendant’s reliance on *Newman, supra*, 5 Cal.3d 48

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<sup>2</sup> In *Newman*, the court held that *possession for sale* of a restricted drug in violation of former section 11911 is a specific intent crime “akin to the crimes of selling . . . a narcotic [citations] . . .” (*Newman, supra*, 5 Cal.3d at p. 54.) In *Daniels, supra*, 14 Cal.3d at page 861, the court concluded that *sale* of a restricted drug in violation of former Health and Safety Code section 11912 is a general and not a specific intent crime. The court in *Daniels* disapproved *Newman* to the extent that *Newman* stated in dictum that *selling* a narcotic was a specific intent crime. (*Daniels*, at p. 862.)

for the proposition is misplaced. In *Newman*, the defendant was convicted of possessing a restricted dangerous drug for sale in violation of former Health and Safety Code section 11911. (See current Health & Saf. Code, § 11378.) Our Supreme Court agreed with the defendant that the offense was a specific intent crime and the trial court had a sua sponte duty to instruct on specific intent, not just general intent. (*Newman, supra*, 5 Cal.3d at p. 51.) Observing that the only evidence of intent was circumstantial – the expert testimony – the court concluded that the failure to instruct on specific intent required reversal because it was reasonably probable that a correctly instructed jury would have found the defendant was in possession of the drugs, but did not have the requisite specific intent to sell them. (*Id.* at pp. 54-55.) The court in *Newman* did not hold that there was any requirement that the jury be instructed that expert testimony is circumstantial evidence. Here, as already noted, the trial court properly instructed the jury on specific intent.

### 3. *Imposition of the High Term Did Not Violate Blakely*

At defendant's sentencing hearing on June 29, 2007, the trial court articulated the following aggravating factors in support of its selection of the four-year high term: defendant was on parole, had prior parole violations, had not performed well on parole or probation, and had a history as a recidivist.<sup>3</sup> Defendant contends imposition of the high term violated the principles set forth in *Blakely* because none of these factors was decided by a jury.

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) our Supreme Court held that the right to a jury trial on facts increasing a sentence beyond the statutory minimum does not apply to matters relating to the fact of a prior conviction; if at least one proper aggravating factor is established, the sentence does not violate the constitution even if

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<sup>3</sup> According to the probation report, defendant had prior convictions for, among other things, burglary, battery, robbery, forgery, possession of heroin, assault, possession of a dangerous weapon, and grand theft.

other improper factors are also considered. (*Id.* at pp. 812, 815, 819-820.) More recently, in *People v. Towne* (2008) 44 Cal.4th 63, 79, 82 (*Towne*), the court held that the right to a jury trial does not extend to findings that the defendant was on probation or parole at the time of the offense, or, under some circumstances, that he performed unsatisfactorily on a prior probation or parole.

Here, since all of the aggravating factors relied upon by the trial court were proper under *Black II* and *Towne*, the sentence did not violate *Blakely*.

### **DISPOSITION**

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.